

FILED  
CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

3/8/2022 3:13 pm

U.S. DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
LONG ISLAND OFFICE

-----X  
:  
DAVID LEACRAFT, :  
:  
Plaintiff, : 21-CV-5688 (GRB) (AYS)  
:  
February 22, 2022  
:  
V. : Central Islip, NY  
:  
CANON USA, INC., :  
:  
Defendant. :  
-----X

TRANSCRIPT OF CIVIL CAUSE FOR PRE-MOTION CONFERENCE  
BEFORE THE HONORABLE GARY R. BROWN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: COURTNEY MACCARONE, ESQ.  
MARK REICH, ESQ.  
Levi & Korsinsky LLP  
55 Broadway, 10th Floor  
New York, NY 10006

For the Defendant: RICHARD SILBERBERG, ESQ.  
ANTHONY BADARACCO, ESQ.  
Dorsey & Whitney, LLP  
250 Park Avenue  
New York, NY 10177

Court Transcriber: ARIA SERVICES, INC.  
c/o Elizabeth Barron  
274 Hovey Road  
Milo, ME 04463  
Aria@leinen.net

Proceedings recorded by electronic sound recording,  
transcript produced by transcription service

1 THE CLERK: Calling case 21-CV-5688,  
2 Leacraft v. Canon USA, Incorporated.

3 Counsel, please state your appearance for  
4 the record.

5 THE COURT: Plaintiff first, please,  
6 plaintiff first.

7 MS. MACCARONE: Good afternoon, this is  
8 Courtney Maccarone from Levi & Korsinsky on behalf of  
9 the plaintiff. And also on the line is Mark Reich from  
10 my office, appearing on behalf of the plaintiff.

11 MR. SILBERBERG: Good afternoon, your Honor.  
12 My name is Richard Silberberg of Dorsey & Whitney, LLP  
13 for the defendant Canon USA. With me is my partner,  
14 Anthony Badaracco.

15 THE COURT: This is Judge Brown. We are  
16 here for a pre-motion conference. Because of the  
17 pandemic, we're doing this by audio conference, which  
18 should suffice for today's purposes. Please  
19 understand, as you've been advised before in my local  
20 rules, anyone can make any motion they want, but I  
21 reserve the right to deem the motion made based on the  
22 filings of counsel as well as the arguments you make  
23 today, so make any argument you want because I'll hear  
24 you on anything you want to say.

25 Let me go to defense counsel. I believe

1 it's your motion to dismiss that's at issue, so why  
2 don't you go ahead and take the lead.

3 MR. SILBERBERG: Very good, your Honor, good  
4 afternoon. The situation here is that we have a  
5 printer -- it's called a multifunction printer because  
6 it performs multiple functions.

7 THE COURT: Let me just be clear on that.  
8 It can print, it can fax, it can scan, yes?

9 MR. SILBERBERG: Actually not. The  
10 plaintiff's printer is a three-function device so it  
11 can print, copy, and scan.

12 THE COURT: Okay.

13 MR. SILBERBERG: There are other models on  
14 the market produced by our client that can perform four  
15 functions. The fourth function would be fax.

16 THE COURT: Got it.

17 MR. SILBERBERG: But this particular  
18 plaintiff with this particular unit has a three-  
19 function device.

20 THE COURT: Okay.

21 MR. SILBERBERG: The issue here is the  
22 scanning function.

23 THE COURT: Right.

24 MR. SILBERBERG: On the box that the printer  
25 comes in, it says it can print, copy, and scan. It

1 does scan. The plaintiff takes the position that that  
2 is a breach of express warranty and that it's also --

3 THE COURT: Hold on, hold on. They don't  
4 take the position that that is a breach of the express  
5 warranty. The position they take is that it won't scan  
6 when it's out of ink and that's the breach, yes?

7 MR. SILBERBERG: Well, there is no such  
8 warranty. That's our position.

9 THE COURT: I understand, I understand, but  
10 their -- their right, we'll call it, irrespective of  
11 the claim -- we'll talk about the legal claim in a  
12 moment -- is that the machine won't scan, and I'll add  
13 unless you do certain things when it's out of ink.

14 MR. SILBERBERG: Correct.

15 THE COURT: Is that a fair summary of the  
16 allegations, yeah?

17 MR. SILBERBERG: It is.

18 THE COURT: Okay. I'm kind of with you on  
19 the express warranty. I'm going to go to defendant's  
20 counsel -- I'm sorry, plaintiff's counsel in a second  
21 and you can say anything you want to me, but I doubt  
22 that the express warranty anywhere says, hey, when  
23 you're out of ink, the scanning function works just  
24 great. It probably doesn't make any such  
25 representation. That's going to be your argument to

1 me, is that fair?

2 MR. SILBERBERG: Correct.

3 THE COURT: Okay. On that limited piece,  
4 let's just start with the express warranty. Where in  
5 the express warranty does it make a representation  
6 that's covered by this?

7 MR. SILBERBERG: I assume that's a question  
8 for the plaintiff, your Honor?

9 THE COURT: Yeah, let's go to plaintiff's  
10 counsel on that, please.

11 MS. MACCARONE: Thank you, your Honor. The  
12 express warranty that the product scans appears on the  
13 box of the device that was purchased by the plaintiff.  
14 The box states that the device scans.

15 THE COURT: Is there a formal either printed  
16 or (ui) or online express warranty that comes with this  
17 product?

18 MS. MACCARONE: The express warranty claim  
19 relates to the advertising that appears on the product  
20 label and also, Canon's website, there are express  
21 warrantees that the device does scan. Nowhere on the  
22 website or on the box does Canon state that there are  
23 certain requirements that must be met in order for the  
24 product to function in that capacity.

25 THE COURT: Listen, so this is a weird one

1 I'm going to throw at you because I recognize -- motion  
2 to dismiss, 12(b)(6), you're supposed to look only at  
3 the complaint, you didn't say this in the complaint.  
4 But the defendants have raised this argument that if  
5 you hold certain buttons a certain amount of time, it  
6 will in fact scan. Do you agree with that as a factual  
7 matter?

8 MS. MACCARONE: No, your Honor. Our client  
9 tried this fix and it did not in fact work for him.

10 THE COURT: That's interesting. That's  
11 interesting.

12 MR. SILBERBERG: Your Honor, this is Rich  
13 Silberberg, if I could just weigh in on that point.

14 THE COURT: Yes. The holding the button  
15 thing, Mr. Silberberg -- the holding the button thing  
16 sounds like it's a screaming question for summary  
17 judgment, right? I don't know that I can deal with  
18 that right now.

19 MR. SILBERBERG: Yeah, and we're not asking  
20 you to because --

21 THE COURT: Okay.

22 MR. SILBERBERG: We recognize that if they  
23 say it doesn't work as a matter of fact, it's hard for  
24 us to convince you to dismiss that allegation on a  
25 motion to dismiss.

1 THE COURT: Right.

2 MR. SILBERBERG: However, I'm representing  
3 to the Court that it is 100% clear that this equipment  
4 does scan without ink in the ink cartridges. All you  
5 have to do is to press what's called the stop button  
6 for five seconds and then you can scan without there  
7 being any ink in the ink cartridges.

8 THE COURT: Is that in the literature  
9 somewhere that's accessible with the product?

10 MR. SILBERBERG: It's on our website. Yes,  
11 it's on our website. There is an article that is  
12 devoted specifically to this. All you need to do is go  
13 to the website and type in a search "scan without ink"  
14 or something of that kind, and it will pop up and tell  
15 you exactly what to do.

16 THE COURT: Okay, interesting.

17 MS. MACCARONE: Your Honor?

18 THE COURT: Go ahead.

19 MS. MACCARONE: Thank you, your Honor.

20 Defendant is making this process seem like it's a lot  
21 easier than it actually is. In order to find this  
22 article that defendant is referring to, you have to go  
23 through multiple steps on Canon's website in order to  
24 finally reach the appropriate search bar that defense  
25 counsel is referring to, and then type in a combination

1 of words that will pull up multiple articles. And if  
2 you pick the correct combination of words, one of those  
3 results may be this article about how to print with a  
4 print-error message, an ink-error message.

5 THE COURT: I hear you, counsel, but it's a  
6 weird thing. I'm trying to sort of suss out the claims  
7 in my mind. The express warranty claim is a very  
8 formal thing, right? It requires many sort of  
9 predicates. You say the scanner on the box -- say I  
10 bought a car, right, and it ran out of gasoline and now  
11 it doesn't run, so it's not a car anymore. I'm not  
12 sure that works for an express warranty claim. I'm not  
13 talking about your DBL claims, which are a completely  
14 different story, but I'm having a hard time imagining  
15 why this should proceed on an express warranty theory.  
16 Maybe you can help me with that.

17 MS. MACCARONE: Canon largely bases its  
18 argument for the express warranty claim on what the  
19 word "scan" means and that it would be extraordinary  
20 for a purchasers to leave empty ink cartridges in the  
21 printer and then attempt to use the machine solely to  
22 scan. Whether a reasonable consumer would interpret  
23 the word "scan" to mean that the device will scan when  
24 there is no ink or whether a consumer would try to scan  
25 when the ink is low are issues of fact that are just



1 not appropriate at this stage.

2 THE COURT: I agree and by the way, I do not  
3 find -- I'll say this to everybody because I like to  
4 reveal any sort of thoughts I've had, which is I don't  
5 find that it's unreasonable for someone to want to use  
6 the scanner when they're out of ink. In fact, I find  
7 it more likely than when you're out of ink, you might  
8 say, I'd better scan that document and at least I can  
9 email it to somebody if I can't print a copy today and  
10 mail it or something. I can't find that categorically,  
11 as a matter of logic, I can exclude that use.

12 But I still don't see how that gets -- I  
13 don't see how that bears on the express warranty. I'm  
14 just not seeing a portion of the express warranty as  
15 set forth here that could potentially -- that it's  
16 plausible that that's violating the express warranty,  
17 that certain buttons have to be pushed or it has to be  
18 -- or even in the ink is in place. I'm not sure that  
19 -- I'm having a hard time with that. I don't know, we  
20 can go back to it.

21 Let me ask defense counsel to continue. Why  
22 don't you go on to the rest of the motion and we'll  
23 come back to that, all right?

24 MR. SILBERBERG: Okay, thank you, your  
25 Honor. What I'd like to address now is the issue of

1 the GLB 349 and 350 claims. The real issue here is the  
2 following: The plaintiff says, as counsel has just  
3 indicated, that your Honor cannot make this  
4 determination at this stage of the case, that your  
5 Honor cannot determine whether a piece of advertising  
6 was materially misleading at the motion to dismiss  
7 stage, so that's what I would like to address firstly.  
8 Your Honor actually wrote about this very issue earlier  
9 this year in the Schulder (ph) case.

10 THE COURT: Okay.

11 MR. SILBERBERG: And your Honor recognized  
12 that there is -- there are cases on both sides of this  
13 equation. There are cases which establish that the  
14 nature of the advertising does not permit a motion to  
15 be granted at the motion to dismiss stage. However,  
16 your Honor also stated that there are other cases and  
17 in particular, you cited the Second Circuit's decision  
18 in Fink v. Time Warner Cable, that where the court can  
19 make a determination as to whether or not a particular  
20 piece of advertising is materially misleading at the  
21 motion to dismiss stage.

22 The way that we look at this prospective  
23 motion is that we believe through briefing, that we can  
24 establish to your satisfaction that as a matter of law,  
25 it is not materially misleading to say that this

1 product scans, because that's all we've said. That's  
2 all the advertisement says, that it scans.

3 THE COURT: Let me back up for a second.  
4 Hold on, counsel, for one second.

5 MR. SILBERBERG: Yes.

6 THE COURT: You mentioned the Schulder case.  
7 Forgive me because I've written a lot this year. We've  
8 been very busy. What was the product there because  
9 seriously, I've done a bunch of cases this year.

10 MR. SILBERBERG: It was a food -- Tony, do  
11 you have that? It was a food case as I recall.

12 THE COURT: I think it was honey. I think  
13 the honey (ui).

14 MR. SILBERBERG: That's right.

15 THE COURT: Okay, I remember that.

16 MR. SILBERBERG: That's exactly right.

17 THE COURT: Okay, because I remember stories  
18 and I remember case names. So that's really  
19 interesting. I let that one go forward because I said,  
20 look, I don't really know what the purchaser was  
21 thinking when they bought natural honey. Did that mean  
22 that it didn't have some trace elements of pesticides  
23 in it or whatever because bees are dirty. They come  
24 back with the stuff and they contaminate it, and they  
25 can't control it. It's really interesting.

1           But in this one, I don't know that I feel  
2 the same way. Can I categorically say that there  
3 aren't purchasers who purchased this product because it  
4 had multiple functions, and maybe they didn't care so  
5 much about printing. I'm a 20<sup>th</sup> century guy and I like  
6 paper, so I care about my printer a great deal. But  
7 there are probably sort of millennials who will say,  
8 I'm never going to use the printer but it's a great  
9 scanner, you know, and if I needed a copy, I would use  
10 it for a copy or something. I have a hard time  
11 categorically -- no, they don't care about this  
12 interrelation between the things.

13           MR. SILBERBERG: So let me address that this  
14 way: We think, and we'd like the opportunity to  
15 convince you that to use the scanner -- I'm sorry, to  
16 use the device solely as a scanner once it has been  
17 depleted of ink such that you cannot use either the  
18 printer function or the copy function --

19           THE COURT: Right.

20           MR. SILBERBERG: -- is so unusual that it's  
21 an idiosyncratic choice of a consumer. And the Oswego  
22 (ph) case, a New York Court of Appeals case, states  
23 very clearly that a company is not required to suss out  
24 the idiosyncratic choices of consumers, that at some  
25 point, a judgment needs to be made as to whether this

1 is materially misleading with regard to whether there  
2 was some millennial out there who would buy a  
3 multifunction device, only use it until the first  
4 cartridge runs out of ink, and then only use it  
5 thereafter for scanning.

6 THE COURT: All right, let's stay with this  
7 because now you're talking about the GBL 349 and 350  
8 claims, correct?

9 MR. SILBERBERG: Yes.

10 THE COURT: Okay. So I've had a fair number  
11 of those over the years and I find it to be an  
12 extraordinarily flexible statute, right, anything that  
13 could be used to mislead consumers, improper practices.  
14 There are a lot of elements to that. Let's imagine --  
15 and I know this won't happen but as plunge into  
16 discovery if we plunge into discovery, there's a memo  
17 out there where some engineer says, I've got a great  
18 idea, let's make sure that the scanner function shuts  
19 out when they run out of ink because this way, we'll  
20 sell a lot more ink. There's a Power Point at a  
21 meeting and they say, yeah, that's a great idea.  
22 Wouldn't that -- I mean, this is -- you sort of have me  
23 more interested on the express warranty thing but  
24 doesn't that fall into the kind of conduct that might  
25 be addressed under a 349 claim?

1 MR. SILBERBERG: First of all, there is no  
2 such memo. Second of all --

3 THE COURT: The issue is complicated (ui).

4 MR. SILBERBERG: I understand. Second of  
5 all, these printers, your Honor, have been on the  
6 market since I want to say -- I'm trying to remember  
7 exactly. 2004 I believe is when this series of  
8 printers was released. So you would think that we  
9 would be getting lots of complaints if in fact this was  
10 something that was deemed to be materially misleading,  
11 but let me address the specific scenario that your  
12 Honor just mentioned.

13 THE COURT: Right.

14 MR. SILBERBERG: And that is, if the goal  
15 was to sell more ink, it would be a really, really bad  
16 way to do it because the machine does in fact scan  
17 without ink. It does. So the notion -- the notion  
18 that we would have done this in order to create a  
19 situation where we're going to sell a lot more ink  
20 doesn't work.

21 THE COURT: Counsel, I hear you.  
22 Understand, I'm in a situation where it's the four  
23 corners of the complaint now, right? So I hear you, I  
24 credit you. I realize that that's probably going to be  
25 the case, that there are other steps, although it's an

1 interesting question. Even if you said -- my evil memo  
2 that I concocted a moment ago -- that's the problem  
3 with me teaching law school at night. I think of  
4 hypotheticals all the time. He gets this memo and he  
5 says, I've got an idea. We can't shut off the scanner  
6 altogether but let's make it really hard to use the  
7 scanner unless you've got some ink. Again, it strikes  
8 me as sort of a classic 349/350 case if that were the  
9 motivation. Again, you're going to tell me it's not  
10 and discovery --

11 MR. SILBERBERG: Well, it's not and there  
12 are no facts alleged in the complaint -- sorry to  
13 interrupt, Judge.

14 THE COURT: No, no.

15 MR. SILBERBERG: There are no facts alleged  
16 in the complaint to establish that. It's just a bare  
17 legal conclusion.

18 THE COURT: But the facts that are alleged  
19 in the complaint -- actually, I have to accept that  
20 it's true that the scanner doesn't work if there's no  
21 ink in the machine. You tell me there's another  
22 procedure but that's not there, right? It's not in the  
23 complaint so I don't really even have that in front of  
24 me. But even if I had that in front of me, what I'm  
25 saying to you is that I don't know that I don't have to

1 let that flesh out a little bit in terms of discovery  
2 and inquiry to see where that came from, does it matter  
3 to consumers and whatnot. It seems to me odd to sort  
4 of odd to say, well, I can conclude at this point that  
5 that didn't matter to anybody, it's fine.

6 MR. SILBERBERG: Well, that would also have  
7 to -- you would also have to assume that -- when a  
8 consumer is looking at the box and deciding whether to  
9 purchase the unit, you would have to assume that that  
10 consumer believes that they can scan without ink.  
11 That's putting something in the -- where are the facts  
12 in the complaint to establish that?

13 THE COURT: I mean, there's nothing in the  
14 complaint that says the box says, by the way, make sure  
15 you always have ink on hand because otherwise, the  
16 scanner is going out or it will be much harder to use.  
17 That's not there, either, so I don't know what the  
18 answer is.

19 MR. SILBERBERG: Let me give you another --  
20 let me give you another complication, another  
21 illustration.

22 THE COURT: I'm all ears.

23 MR. SILBERBERG: Which I think will make the  
24 situation even more clear from my perspective. Let's  
25 take the facsimile function because they also claim it



1 can't fax without it. Actually, it can.

2 THE COURT: I thought you said these don't  
3 fax at all.

4 MR. SILBERBERG: They're talking about other  
5 units. They're talking about models (ui).

6 THE COURT: Okay.

7 MR. SILBERBERG: Other in the series. It's  
8 called Pix (ph), the series. So let's take the  
9 facsimile illustration. They say it also can't fax  
10 without ink and we of course say it can through the  
11 same process. Let's consider the following: You  
12 actually do need ink in order to perform certain of the  
13 facsimile function. What you can do is you can go to a  
14 machine, you can put it into the fax tray, and you can  
15 send a fax. However, if the person receiving the fax  
16 has no ink, that person is not going to receive that  
17 fax because there's no ink to print it, in addition to  
18 which the sender sending that fax, if that sender has  
19 no ink, that sender is not going to be able to print a  
20 receipt showing that that fax was transmitted.

21 THE COURT: Yeah.

22 MR. SILBERBERG: By the way, this is their  
23 complaint. They do say that you can't fax. I mean, at  
24 some point, you get to the position of ridiculousness,  
25 and we think that's where we are. There is absolutely

1 no basis for saying that this can't scan without it and  
2 there are no facts in this complaint that establish  
3 that ordinary circumstances are those in which a  
4 consumer would as a regular matter try to scan without  
5 any ink.

6           The last thing I'd like to say about this  
7 particular point, Judge, is let's assume that my  
8 representation to you is correct, that this can scan  
9 without ink. You just mentioned opening this up to  
10 discovery. What would that look like? I mean, imagine  
11 what the expense would be. They are talking about a  
12 series of dozens of models that they want to bring  
13 under the umbrella of this case. And if my  
14 representation to you is correct that these can scan  
15 without ink, is it really fair to open up to full  
16 discovery a case to show what, that it can scan without  
17 ink?

18           THE COURT: Counsel, it's really, as you  
19 well know and your client who is a big company, they  
20 know that interesting is bad, right, because it causes  
21 a lot of money and we argue a long time, but it's  
22 really interesting. But let me hear your adversary on  
23 the GBL claims.

24           MS. MACCARONE: I would like to address some  
25 of the points that defense counsel made in turn.

1 First, the argument about it being so unusual for a  
2 person to want to scan a document without ink in their  
3 printer, that is certainly not the case. Just based on  
4 our client's experience, it's an experience that -- we  
5 talked to other consumers who have experienced this  
6 same issue. Just in, you know, my personal experience,  
7 there are certainly situations in which people would  
8 want to use their device in order to scan documents  
9 when there is no ink in the device.

10 THE COURT: Clearly, you had me at hello on  
11 this one, right, because I said to you earlier that it  
12 might be --

13 MS. MACCARONE: Okay.

14 THE COURT: -- that it's more critical that  
15 you have a scanner. Oh, gosh, I can't print it, let me  
16 just scan it and email it. I'm going to email it to my  
17 office, where I'll print it, right? I hear you so you  
18 can go ahead.

19 MS. MACCARONE: Absolutely, okay. All  
20 right, great. Also, to the argument about if -- that  
21 the devices were released in 2004 and if this were an  
22 actual issue, there would have been more complaints.  
23 The internet is replete with complaints about this  
24 issue. And to defense counsel's point about, if they  
25 wanted to sell more ink, then this is not the way to do

1 it, then why not just include a disclosure on the  
2 product label about this? It does seem that ink sales  
3 are at the bottom of this decision from Canon's  
4 perspective.

5 THE COURT: All right, good. I think I have  
6 what I need.

7 MR. SILBERBERG: Your Honor, can I make one  
8 other -- one other point?

9 THE COURT: You can, then shift gears and go  
10 to the unjust enrichment claim.

11 MR. SILBERBERG: Yes, of course. I wanted  
12 to point out that we do cite a case in our pre-motion  
13 conference letter, which I think is very instructive.  
14 It's the (ui) case and that case is as close to this  
15 case as can be. It's a case that was decided by the  
16 Second Department in 2002. It involved a case against  
17 Hewlett Packard involving these printers, same type of  
18 printers. And the issue in that case was that the  
19 printer box showed that there were cartridges packed in  
20 the box and in fact, that was true. You open up the  
21 printer, you take out the cartridges, you put the  
22 cartridges in the machine, and it prints. However, the  
23 cartridges were not the standard-sized cartridge that  
24 you would buy at Staples.

25 THE COURT: Yeah, those are the ones --

1 MR. SILBERBERG: They're what we call --

2 THE COURT: (Ui).

3 MR. SILBERBERG: Sorry?

4 THE COURT: I'm familiar with them, yes.

5 They're sample-size cartridges more or less, yes?

6 MR. SILBERBERG: Right, they're sometimes  
7 called starter cartridges.

8 THE COURT: Right.

9 MR. SILBERBERG: So the plaintiff alleged  
10 and brought an action under 349 and 350 as well as I  
11 think a breach of express warranty claim. I'm not sure  
12 about that but certainly 349 and 350, and said this is  
13 materially misleading. You said there were cartridges  
14 in there. I assumed that these are the cartridges  
15 which I'm going to get when I go to the store and that  
16 they will last me a while. Then they find, to their  
17 concern, that they don't last very long, that they're  
18 starter cartridges.

19 The court held as a matter of law that this  
20 is not materially misleading. It says on the box,  
21 there are cartridges in this box and these cartridges  
22 work with this printer. We say, this machine scans,  
23 and it does. And whether you're going to engraft on to  
24 that representation or that advertising the issue of  
25 whether or not it scans in the presence of ink or

1 without ink, that seems to us not to be a proper  
2 application of 349 and 350.

3 But even if it were, we believe that the  
4 circumstances under which the plaintiff is positing  
5 this is not a circumstance that can be described as  
6 anything other than idiosyncratic because we're talking  
7 about a consumer who is not going to replace the  
8 cartridges? So you're going to buy a machine for \$200  
9 let's say, you're going to let it cycle through one  
10 cartridge, and then you're going to give up on the  
11 machine after it runs out of ink and use it only as a  
12 scanner? If that was your intent, why not just buy a  
13 cheap scanner?

14 THE COURT: Let me follow up on that, right?  
15 Isn't it fair to say that there might be instances  
16 where a consumer runs out of ink and figures, as I  
17 suggested earlier, that they're going to use the  
18 scanner until they can get to the store and get the  
19 ink. The fact that they had to go through that  
20 additional expense, lack of use, and so forth, isn't  
21 that some -- doesn't that raise some question as to --

22 MR. SILBERBERG: Your Honor, I think that's  
23 a fair point. I think that's a fair question.

24 THE COURT: Okay.

25 MR. SILBERBERG: And I would respond to it

1 in two ways. One is, there are multiple ways that you  
2 can find out how to scan without ink, and we can  
3 address those in our papers. The other point is this:  
4 Is that the foundation of a class action? Let's just  
5 think about that for a minute. If there are occasional  
6 instances in which a consumer is not going to go to the  
7 store and buy a replacement cartridge and instead is  
8 going to let it lie fallow and just use it as a scanner  
9 or just use it kind of on a one-time-only basis, to  
10 scan something until he has to go to the store that  
11 evening to buy the cartridge, is that the foundation of  
12 a class action? I mean, looking ahead -- looking  
13 ahead --

14 THE COURT: Counsel, let me hand your  
15 question back to you like this: Does it matter, and it  
16 might not matter and it's certainly not developed in  
17 the factual record, as to why this particular set of  
18 features was -- I'm not going to call it features --  
19 circumstances was included in the machine? In other  
20 words, was there a need to scan -- to shut off the  
21 scanner or make one scan differently in the absence of  
22 ink, or does the fact that it was included -- if it  
23 wasn't a mechanically or materially necessary factor,  
24 does that raise a question of whether or not it's a  
25 deceptive consumer-oriented practice?

1 MR. SILBERBERG: Well, let me answer that  
2 question this way because I don't know how far outside  
3 the pleadings we want to get. But the fact of the  
4 matter is that there was an engineering reason to do it  
5 this way.

6 THE COURT: Okay. That's highly probative -  
7 - that's highly significant I think in the resolution  
8 of the thing. I just don't think we're there yet,  
9 right? That's the problem. That also begs some  
10 questions for me about what should happen next. But  
11 you can see a circumstance where, if it were built  
12 intentionally into the machine for no good reason,  
13 right -- essentially, I have my all-in-one printer  
14 telling me, you're out of ink so you can't scan. Well,  
15 if that's not true and it was sort of crafted that way,  
16 then I'm being deceived, yeah?

17 MR. SILBERBERG: Well, I think it goes back  
18 -- I appreciate the questions, I appreciate the  
19 discussion very much. It's very stimulating, very  
20 provocative. I still think it goes back to the  
21 question of whether this is materially misleading. And  
22 when you go into the case law as to what that means, I  
23 don't think that this is on the side of the line where  
24 it can survive a motion to dismiss. Of course, that's  
25 your judgment to make but I do think, your Honor -- I



1 do think it's worth of exploring what would come next  
2 because --

3 THE COURT: We'll get there but before we  
4 discuss what comes next, I need to get to something  
5 first, which is the unjust enrichment claim. You're  
6 saying it's primarily -- and I regularly dismiss unjust  
7 enrichment claims for this reason, that it's a  
8 duplicative of another claim. What claim is it  
9 duplicative of?

10 MR. SILBERBERG: I think it's duplicative of  
11 both claims. It's duplicative of both the express  
12 warranty claim and it's also duplicative of the 349 and  
13 350 claims. And as your Honor I think would probably  
14 recognize, there are an abundance of decisions that  
15 have recognized that an unjust enrichment claim is just  
16 a tagalong claim.

17 THE COURT: Okay.

18 MR. SILBERBERG: That you would not -- it  
19 would be extremely unusual, and I'm frankly not aware  
20 of any, where you would have one of these putative  
21 class action cases where an unjust enrichment claim  
22 would be the surviving claim.

23 THE COURT: I hear you.

24 MR. SILBERBERG: In other words, the other  
25 claims would have been dismissed and it would have been

1 deemed to be survivable on the basis of unjust  
2 enrichment. I'm not aware of a single case where  
3 that's happened.

4 THE COURT: Counsel, I've got to tell you --  
5 this is just an interesting background fact. The  
6 frequency with which unjust enrichment claims are  
7 dismissed under New York law because it's a breach of  
8 contract claim or whatever else it is, is one of the  
9 inspirations for doing the pre-motion conference in the  
10 way that I do because invariably, when we get to this  
11 claim, someone is always like yeah, if this other thing  
12 goes forward, then this one can't, right? So it's easy  
13 and saves us some paper and some time, so that's one of  
14 my inspirations for doing this.

15 But let me go to your adversary for one  
16 moment with this question: Assuming for the purposes  
17 of argument only because we haven't gotten there yet,  
18 your GBL claim or claims survive, do you agree that the  
19 unjust enrichment claim drops out at that point?

20 MS. MACCARONE: Yeah, your Honor, we  
21 recognize that there is a split in the circuit on this  
22 issue. And without knowing which of our claims  
23 survive, it's hard to concede that this claim is not  
24 necessary. But to answer your question, if one of our  
25 -- if our GBL claim does survive, then yes, we

1 recognize that the case law would support dismissal of  
2 the claim.

3 THE COURT: Okay, all right, counsel.  
4 You've done fine work today. I'm ready to render a  
5 partial -- well, I'm really to decide actually on the  
6 motions to dismiss. I'm going to proceed.

7 So as set forth in Rule 2(e)(1) of my  
8 individual rules, a practice recently affirmed by the  
9 Second Circuit again, the Court reserves the discretion  
10 to construe the pre-motion letters along with counsels'  
11 argument as the motion itself. It's particularly easy  
12 to do in a case like this, where counsel has done a  
13 fine job of briefing and arguing the motion, and I  
14 thank you for that. As noted in that rule, this  
15 procedure has been upheld by the Second Circuit and I  
16 actually have the cite here. It's Brown v. The People  
17 of the State of New York, 21-CV-1408, which was decided  
18 January 26<sup>th</sup>, 2022 by the Second Circuit. Just showing  
19 you I'm cutting edge and the Court has the discretion,  
20 all right? The exercise of discretion is rendered more  
21 probative by a couple of factors, including the  
22 existence of the original rule, the fact that I put you  
23 on notice of it, but also because of the pandemic,  
24 we're trying to keep things moving and it's still a  
25 little bit hard, so I'm hoping we'll meet together

1 soon.

2 All that said, this motion is decided -- the  
3 motions to dismiss. I'm going to deem the defendant's  
4 motions to dismiss made. It's cited under the well-  
5 established standard review for such matters as  
6 discussed in countless cases, but I'll cite one, Boris  
7 v. Nassau County District Attorney, 2017 W.L. 9485714,  
8 which I'll incorporate by reference. But we all know  
9 what it says, which is that a court is required to  
10 decide assuming the allegations to be true for the  
11 purposes of the motion whether there are sufficient  
12 facts to determine whether the claim is plausible on  
13 its face. And when I say that, I need to emphasize  
14 that there is a portion of that rule that says  
15 inferences must be drawn in favor of the non-movant,  
16 which I think becomes very important here.

17 Based on my review of the complaint and,  
18 again, counsels' fine argument of the motion, I find  
19 that the complaint does in part state plausible claims  
20 and does not in other parts. Let me start with the  
21 express warranty claim.

22 Here, I'm going to say that that claim is  
23 not plausible because at least at this juncture, with  
24 what we have before us -- and counsel did a nice job on  
25 pulling up certain cases. I'll note the Marshal v.

1 Hundai Motor case, 334 FRD 36 at 51, which states that  
2 to allege a claim for breach of express warranty in New  
3 York, the claim must show that the express warranty  
4 existed, was breached, and that the claimant had relief  
5 on that warranty. I think if you look at the specifics  
6 of this case, there is no express warranty term that  
7 says the scanner will work when there's no ink or the  
8 scanner will not work unless you do certain things when  
9 there is no ink. I just don't think that the express  
10 warranty is specific enough to cover this circumstance.  
11 So under those principles, I'm going to dismiss the  
12 express warranty claim.

13           The GBL claims are a much different  
14 scenario. As we all know, GBL 349 and 350 are broadly  
15 addressed to a variety of claims that relate to things  
16 of importance to consumers, including any sort of  
17 deceptive practice on consumers. I've done a lot of  
18 writing on 349 and 350 and I'm going to say that those  
19 statutes as construed are broad enough to cover these  
20 circumstances, and I believe that the GBL claims should  
21 go forward.

22           Counsel cites the interesting Hewlett  
23 Packard case from the Second Department and I have  
24 considered that, but I don't think that the  
25 substitution of the smaller ink cartridge for the large

1 ink cartridge has exactly the same potential in these  
2 circumstances here. I'm only drawing inferences and,  
3 again, I have to draw the inferences in the favor of  
4 the plaintiff here, who is defending against the  
5 motion.

6 I will say that, as I noted early on, that  
7 in a circumstance in which the ink runs out, it might  
8 be more vital -- I don't know but it could be --  
9 there's a reasonable inference that it could be more  
10 vital to a consumer that the scanner works at that  
11 moment so they can take some other action with the  
12 printer because they can't get it to print out of the  
13 machine, so they scan it and do something else, email  
14 it or send it someone else who can print it or  
15 whatever. Any of those things could be and of course,  
16 this is very preliminary and I'm not making any  
17 rulings.

18 I suspect and certainly am expressly holding  
19 that this will be revisited at the summary judgment  
20 stage, and I'm going to talk to you about that in a  
21 moment as to where we go next. Anyway, I find that the  
22 GBL claims survive and as a result of that, as  
23 discussed with counsel, the GBL claims will go forward,  
24 the unjust enrichment claims drop out as duplicative.  
25 And there are a bazillion cases that say that so I'm

1 not going to bother cluttering the record.

2           So that's my ruling on the motions to  
3 dismiss. I often get the question, is there a written  
4 decision that will follow? No. You can order a  
5 transcript of this and that is the decision of the  
6 Court. We'll issue a short, written order today  
7 saying, see transcript for details, but if you want the  
8 decision, you can order the transcript.

9           That brings us to the question of what goes  
10 next? Now, the first thing I want to say is, counsel  
11 raised the specter of discovery here. I recognize that  
12 class-wide discovery is broad and very painful and very  
13 expensive for both sides, and it's a big risk. You're  
14 very fortunate in that you have Judge Shields on this  
15 case. She is terrific and I generally leave it  
16 entirely to the magistrates to regulate discovery.  
17 However, I'd like to talk to counsel since we're on it.

18           Do you foresee sort of coming up with stages  
19 of discovery, phases where perhaps we look at issues  
20 like the more narrow -- why the machines operate the  
21 way they do, what are the mechanical aspects, if you  
22 hold the button, does it scan or whatever, before going  
23 into class-wide discovery. Does that make sense? Is  
24 that a good way to sort of phase this through?

25           MR. SILBERBERG: This is Rich Silberberg,

1 Judge. I certainly do think that the issue of whether  
2 it scans without ink should be prioritized in terms of  
3 discovery because that is the central focus of this  
4 case. In other words, the complaint alleges that you  
5 cannot scan without ink. I think you heard counsel a  
6 few minutes ago say that her client tried to do this  
7 and can't.

8 THE COURT: Yeah.

9 MR. SILBERBERG: And I think we are, as I  
10 said, 100% certain that that allegation is wrong, and I  
11 think it would be helpful that we find a way, perhaps  
12 with Judge Shields' assistance, that we could focus on  
13 that issue because if we want to narrow the case down,  
14 it would certainly be good to have that issue dealt  
15 with, and then we could talk about whether the manner  
16 in which one can scan without ink is problematic. But  
17 it seems to me that there are those two broad issues  
18 that are presented in the case, and the first one is  
19 going to be pretty easy I think to discern.

20 THE COURT: Yeah. Let me say something sort  
21 of as a preemptive strike here because I know where  
22 counsel is going to go next on this, which is -- I  
23 worked in the computer industry, actually in the legal  
24 department of another -- of a software company for a  
25 number of years. I think we used to call this a



1   workaround, right? So the fact that the defendant has  
2   what I'll call a workaround for the scanner not working  
3   without the ink may or may not preclude liability. I  
4   don't know. I mean, there may still be liability  
5   notwithstanding that fact but it just might be  
6   different. It would make sense to me that identify  
7   whether that's the issue or the issue is, it just  
8   doesn't work at all.

9           Let me go to plaintiff's counsel with that.

10          MS. MACCARONE: I agree with that statement,  
11   your Honor. Even if discovery shows that there are  
12   workarounds, there is perhaps a temporary fix in this  
13   case, that's not the -- that's not the entire issue.  
14   We are open to discussing reasonably focused discovery  
15   with defendants. We can have those conversations  
16   online and refer back to you if that's okay with you.

17          THE COURT: Look, when I posited the  
18   possible existence of an engineer or sales person's  
19   memo that says, I've got a great idea, let's shut off  
20   the scanner when there's no more ink, I know that sent  
21   you into like a dream world of excitement. So I would  
22   suggest that you satisfy yourself that that doesn't  
23   exist, things like that don't exist, and that (ui)  
24   explanation of why it works the way it does, I think,  
25   yeah.

1 MS. MACCARONE: Right, exactly. It would be  
2 -- that's certainly information that we would want to  
3 gather through discovery.

4 MR. SILBERBERG: I mean, I have to say that  
5 I don't want to dampen anybody's expectations but as I  
6 said, this was developed in 2004 and we're in 2022.  
7 So, you know, I can't imagine what exists and doesn't  
8 exist. I'm not going to speculate but I don't want to  
9 elevate anybody's expectations as to what might exist  
10 from 2004.

11 THE COURT: People can have dreams, right?  
12 That's the thing.

13 MR. SILBERBERG: Yes, of course, of course.

14 THE COURT: When I said it, she thought up,  
15 I imagine, the Power Point to the board, the financial  
16 projections, right, of how much this will generate?  
17 That would be the greatest thing that ever happened.  
18 But it's not that, it's going to be something  
19 different. And whatever we're guessing, it's a third  
20 thing, but you know I'm always the last know.

21 What I'll say is this: I don't want to  
22 constrain Judge Shields in any way but she is a  
23 terrific person to work with. What I would say to you  
24 is, you both seem very reasonable and very smart and  
25 you know what's at issue here. Nobody wants to do

1 class-wide discovery if this is going to be a dry well  
2 at the end of the day. It's just going to cost  
3 everybody a lot of money. So what I would say is, if  
4 you two can work together to kind of come up with a  
5 proposal, meet and confer first before you even see  
6 her, I'm sure that will go very well. Again, (ui) I  
7 think it's a good idea if you can structure discovery  
8 in a way that becomes reasonable. I certainly would be  
9 happy to allow you more time to do that so that we  
10 don't have to waste time and energy on things we don't  
11 need to chase down, so that helps, yeah?

12 MR. SILBERBERG: Understood, your Honor.

13 MS. MACCARONE: Understood, thank you, your  
14 Honor.

15 MR. SILBERBERG: Your Honor, may I --

16 THE COURT: Anything else?

17 MR. SILBERBERG: May I use this opportunity  
18 to make an oral application for an extension of time to  
19 file our answer to the complaint because I believe --  
20 I'm trying to remember what the time frame is.

21 THE COURT: It's some number of days but  
22 what do you want?

23 MR. SILBERBERG: I'll just ask plaintiff's  
24 counsel, can we have thirty days to respond?

25 MS. MACCARONE: Yes.

1 THE COURT: What do you say, counsel?

2 MS. MACCARONE: That's fine.

3 THE COURT: Okay, that's great.

4 MR. SILBERBERG: Thank you.

5 THE COURT: I would have given you 32 days  
6 if you'd ask but 30 is good, too. Make it 4:30 p.m.,  
7 you know? Okay, good. Anything else we should do  
8 while we're on the phone today?

9 MR. SILBERBERG: I think that's it, your  
10 Honor. I guess I would ask the following question:  
11 Does your Honor intend to schedule a Rule 16 conference  
12 or would your Honor prefer that we try to work  
13 something out and give us some time to see if we can  
14 present something to Magistrate Judge Shields?

15 THE COURT: I won't do that at all. That  
16 will be entirely up to Judge Shields. But I would say  
17 if you all want some time to work on that and get -- I  
18 don't know what her rules are on this. Take a look.  
19 But if you get in touch with her, she's very flexible.  
20 I think if you say to her, Judge, we're working on this  
21 and we're going to try to work it out, work out some of  
22 these discovery issues but we'd like X number of days  
23 or whatever, I don't think she will have a problem with  
24 that, all right.

25 MR. SILBERBERG: Very good. Thank you, your

1 Honor.

2 THE COURT: Stay well. It's good talking to  
3 you.

4 MS. MACCARONE: Thank you, your Honor.

5 MR. SILBERBERG: Thank you.

6 \* \* \* \* \*

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18 I certify that the foregoing is a correct  
19 transcript from the electronic sound recording of the  
20 proceedings in the above-entitled matter.  
21

22  
23   
24

25 ELIZABETH BARRON

March 7, 2022